

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

CABLE TELEVISION DIVISION

Petition of Verizon New England Inc. for)
Adoption of Competitive License Regulation)

Docket No. CTV-06-1

COMMENTS OF RCN

I. Introduction

RCN submits these comments in response to the above-referenced Petition of Verizon for relief from long-standing Massachusetts cable franchising procedures and the Order Instituting Rulemaking issued by the Department of Telecommunications & Energy (“DTE”), Cable Television Division (“Cable Division”) opening the above docket.

RCN is a competitive broadband provider currently operating under terms of a cable license in thirteen (13) Massachusetts communities: Arlington, Brookline, Burlington, Dedham, Framingham, Lexington, Natick, Needham, Newton, Somerville, Stoneham, Wakefield, and Woburn. In no case did the licensing process stretch out anywhere close to the seventeen (17) months (or longer) time frame cited by Verizon in its Petition as somehow typical for Massachusetts. The rule changes sought by Verizon amount to a proposed solution in search of a nonexistent problem.

The Cable Division (the Division) is correct in noting that the cable licensing process is under scrutiny in Congress and at the FCC, and that any action by DTE at this juncture may well be preempted by the changes in cable franchise law that Verizon and others are seeking at the federal level. There is a “big picture” aspect to any discussion of

cable franchising reform. RCN offered its views of franchising in this context within its comments to the FCC which are attached hereto for the Division's reference. In addition, RCN summarized its seminal arguments as to why the Division should not open a rulemaking process at all in a letter to the Division dated March 21, 2006. This letter is also attached so as to be made part of the formal record in this proceeding. While the national debate has its own ebbs and flows, the Division has determined to seek comment as to whether it should further consider this rather narrowly cast Petition while the national debate is ongoing. This fits within the Division's role as overseer of the cable licensing process in the Commonwealth, but action at this juncture is by no means mandated. No doubt the record to be created in this process will clearly show that the Division need go no further.

These RCN comments focus on the practical aspects of the proposed rules changes. Are these changes needed? Do they really change anything for the better? Are the proposed rules changes counterproductive? Will they slow the process down more than speed it up? RCN believes that the current rules serve Massachusetts residents well and facilitate the growth of cable television competition in a fair, equitable and timely manner that is responsive to unique local needs.

II. The RCN Experience

RCN is proud to assert that we paved the way for cable television competition in the Commonwealth. It was not easy to be the first to challenge the incumbent cable operators with a facilities based network built to directly compete in an unprecedented manner. The cable companies pushed back. There was litigation centered around our access to utility poles. Our partner at the time, Boston Edison, was challenged at the

DTE and in the courts with allegations of cross-subsidy abuses. Our meetings with Cable Advisory Committees were video taped by cable operators, our every word scrutinized and used out of context to mount challenges to our licensing efforts in petitions to the FCC. “Level playing field” based threats were made as the first municipalities stepped up to grant RCN cable licenses. We stuck to the structure inherent in the Division’s licensing process and, with cooperation of municipal officials, we prevailed and offer robust competition to this day.

Not only is Verizon free from this type of anti-competitive behavior as it begins its licensing efforts but, unlike RCN, Verizon is able to build its cable system under its existing authority as the incumbent telephone provider before it has been granted a cable license. The most significant obstacle to “speed to market” that RCN faced at its inception is non-existent for Verizon. The cable license performs a turn-key function for Verizon. Deploying the fiber upgrades to its system necessary to support the provision of cable television services takes time and planning. Verizon fails to explain why it cannot simply apply for the necessary cable licenses at the same time it begins its fiber deployment, so that it will have authority to provide service as soon as the requisite facilities are in place.

Communities beyond RCN’s footprint have seen the benefits of competition and are eager to welcome an alternative provider. RCN has found a way to establish credible precedents for matching PEG Access grants, resolving buildout issues and making franchise free payments. The comfort level for municipalities seeking a cable competitor is considerably higher now than when RCN rose to the challenge alone in 1997.

The license negotiations for a competitive franchise quickly focus on the terms of the existing cable license(s). The process can be a relatively speedy one if the applicant and municipality are willing to work together. RCN found the level of cooperation on the part of the Issuing Authorities to be very high. Consider a typical time frame that is eminently workable under the present Division licensing rules:

- January 4 – Issuing Authority (IA) advertises for applicants (30 day deadline for response). Commission waiver routinely granted.
- February 3 – Applicant files completed Form 100 (IA must issue its Issuing Authority Report within 90 days).
- March 22 – IA issues its Issuing Authority Report after review of Form 100. This is essentially the IA's demand for terms of cable license. (30 day deadline set for response). Based primarily on existing license with new terms to fit competitive process.
- April 21 – Applicant files Amended Application in response to IA Report and this forms the basis for the proposed cable license. Response time here in control of applicant.
- May 10 – IA holds a public hearing on the proposed cable license. (IA must approve or deny within 60 days of close of hearing).
- June 4 – IA grants cable television license.

This process can be expedited to take less than 5 months. It could take longer, of course. A range of 4-6 months would seem to be typical for an applicant such as Verizon going forward. This is a timeline that is very workable. In fact, the first Verizon cable license grant process in Woburn took just about 6 months to complete. It began with an IA advertisement for applicants on February 21, 2005 and was completed on September 30, 2005.

III. What are the Unreasonable Barriers?

The rhetoric in the Verizon Petition is strong: “unreasonable barriers to entry” have been established; there is a “dire need for reform”; the current rules have “no legitimate purpose”; and the process “undercuts incentives to invest.” Yet there is no specific example of any such unreasonable barrier. This makes it difficult to address Verizon’s concerns.

IV. Local Control Affirmed – De Novo Review Ineffective

There is one fundamental fact at the core of this proposed rulemaking that calls into question the entire attempt at so-called reform. Under Massachusetts law only a municipality may grant a cable television license (M.G.L. chapter 166A § 3). Verizon acknowledges this fact in its Petition at page 5 when it asserts that the proposed regulation will improve and streamline the licensing process “while preserving local control of the outcome.”

If a municipality fails to grant a license within ninety (90) days then Verizon may appeal to the Division for a de novo review. To what end? Another sixty (60) days is tacked on to the process. The Division cannot grant a license. What can be accomplished? The Division may assert its “ultimate authority” over the form of the licensing process but in the end only a municipality can grant the license. Any Division action inconsistent with state law is likely to prompt litigation and further delay.

V. Where Are the Delays in the Process?

Verizon posits that four intermediate steps in the licensing process make the timeline lengthy and open-ended. A threshold decision to begin the licensing process is

rather basic, even essential. It is not clear why the making of such a decision is a cause of delay. The process must begin at some time.

The Division routinely grants a waiver to shorten the application solicitation process. The municipalities need to offer an opportunity for interested parties to apply. Thirty (30) days is not unreasonable. The Commission could consider formalizing a shorter period but that, of itself, is not grounds for a rulemaking.

The Issuing Authority Report in response to the application is a useful tool to facilitate the process. In a competitive process the existing license or licenses form the basis for the “specifications report”. This step is easier in a competitive context and in RCN’s experience has not proven to be a source of unreasonable delay.

In the early years of cable licensing there were many applicants bidding for a single franchise. Municipalities chose to grant “the” cable license to one applicant. This grantee was then required to prove that (with a license grant in hand) it had the financial backing to deliver on the license terms. Circumstances have changed over the years. The provisional license requirement may have outlived its usefulness. However, for purposes of this proposed rulemaking it is important to note that the provisional license is not a source of delay. In RCN’s experience, as noted in DTE’s request for comments, the Final License is often signed immediately following execution of the provisional license. The provisional license step in a competitive process is merely a formality and has never proven to be the cause of an unreasonable delay.

Again, without any examples of unreasonable behavior by municipalities presented by Verizon, RCN is unable to address Verizon’s concerns that these “intermediate steps” are a cause of unreasonable delay.

VI. Cable Television is Different Than Telephone.

Verizon is new to the cable television business. It is only natural that it would lean toward a utility model for the basis of regulation. Cable television is not telephone. A culture has developed around cable television as it has grown to be a powerful force as a communications medium in the community. Municipal officials need to insure fairness in the licensing process. RCN and the incumbent cable operator have assumed “burdens” responsive to local community demands as part of the licensing process. Verizon must not be allowed to assume an automatic advantage in a competitive situation if it chooses to ignore reasonable local licensing terms at the expense of the community. More than just pay a 5% franchise fee, Verizon must be ready to match PEG Access grants in a way that is equitable for a new competitor and beneficial to the cable community. As Verizon is successful in gaining cable licenses in Massachusetts it is becoming clear that this part of the process is working itself out and does not appear to be a source of unreasonable delay. As a new applicant Verizon needs to listen as well to the specific needs expressed by communities related to Institutional Networks and particular right-of-way concerns, such as allowance for competitor access as new underground facilities are constructed in local streets and developments. Verizon must also be sensitive to buildout parameters, customer service rights, and any other unique local issues that inure to a communications medium, and be responsive to these concerns to the same extent that existing cable providers are required to be.

As licenses are granted municipal officials will no doubt begin to educate each other on the nuances of regulating a Title II provider under Title VI, and this will serve to facilitate and ultimately expedite the cable licensing process. Verizon’s behavior – good

or bad – in its rollout of cable services in the initial communities it serves will appropriately inform how subsequent communities approach their cable license negotiations with the company. There may even be significant concerns raised in each locality as Verizon presses for three (3) or four (4) year “opt-out” provisions. Pushback may come from a municipality questioning Verizon’s long-term commitment to the community in light of the company’s insistence on a unilateral right to walk away from its cable license early on in the term.

Unlike telephone certification, cable licenses address a significant number of local issues that vary from community to community. It has been RCN’s experience in Massachusetts that each city and town addresses the issues surrounding the grant of a cable license differently. However, the fundamental underpinnings of the licenses are similar and the process moves along in a way that is managed more by the applicant than the municipality. Individual community needs are addressed in each process. That is why in some of RCN’s licenses we provide a fiber I-NET and in other communities we do not. Some are top heavy with upfront PEG Access grants and others extend payments over time. None of RCN’s licenses have a three (3) year “opt-out” clause.

Verizon is quick to point, however vaguely, at municipalities as being the source of unreasonable delay. The Division is correct in pointing out that Verizon holds itself beyond reproach in this regard. Municipal comments will no doubt be instructive in consideration of all reasons for alleged delay in the Verizon licensing processes to date.

Conclusion

Current state law recognizes the role of the municipality in establishing the version of the cable culture that best fits its own local communication needs. Under the

proposed rules at the end of ninety (90) days, followed by the de novo review for an added sixty (60) days, the fact remains that only the municipality may grant a cable license. What do these rules changes really accomplish? The current process can be routinely completed within a six (6) month period (or less). Verizon is not prevented from building its cable system while the franchising process is ongoing. With only the most basic planning, Verizon should be able to initiate the local franchising process at the same time it begins upgrading its network and expect to have a franchise in hand by the time it is ready to begin providing video service. Speed to market is more in the control of Verizon than the municipality.

Since the rules changes accomplish little of practical significance, are we left to conclude that they are offered by Verizon for more subtle reasons? Is the imposition of a ninety (90) day deadline meant to intimidate municipal officials to pressure agreement to Verizon's terms or face the loss of local control in a de novo review at the state level? Given the demonstrable body of evidence supporting the independent stance of Massachusetts municipal officials this would seem an unlikely rationale on the part of Verizon.

Could it be that Verizon might see value in creating the perception that in Massachusetts municipal government can be overridden, in effect creating a state-wide franchising opportunity for Verizon? The major lobbying effort of Verizon to achieve national cable franchising relief through federal legislation and action at the FCC highlights the Verizon goal of usurping local control of the cable franchising process.

The Division should decline to expend its scarce resources conducting a rulemaking proceeding at Verizon's behest, given the ongoing national franchising

debate. RCN respectfully urges the Division to affirm its existing guidelines consistent with state law and maintain the well-established role of municipal government in the cable licensing process. The proposed rules changes are unnecessary. There is no need for a further rulemaking in this matter.

Respectfully Submitted,

RCN

By,

s/_____

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